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No. 08-1384

In The
Supreme Court of the United States

JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER,

Petitioners,

v.

HOLY SEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

DOUGLAS H. MORRIS
LEA A. PLAYER
MORRIS & PLAYER PLLC
5924 TIMBER RIDGE DRIVE
SUITE 202
P.O. BOX 1329
PROSPECT, KY 40059
(502) 228-0664

WILLIAM F. MCMURRY
Counsel of Record
WILLIAM F. MCMURRY,
ATTORNEY-AT-LAW
5932 TIMBER RIDGE DRIVE
SUITE 101
PROSPECT, KY 40059
(502) 228-7000

Counsel for Petitioners

July 21, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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I. Ashcroft v. Iqbal Did Not Announce a New Standard of Review, Nor Does It Warrant A Renewed Facial Attack

The Holy See claims that after this Court's decision in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), "the law of the case regarding the sufficiency of petitioners' pleading is now unsettled." Brief in Opposition, p. 26. However, the rule stated in Iqbal, relied upon by the Holy See, that "conclusory allegations" will not suffice is not new. Iqbal cited the case of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007), for this proposition, wherein the Court stated, "the longstanding conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." This rule has been applied by the circuit courts for many years, including the Sixth Circuit. Thus, the same rule was applied by the Sixth Circuit in O'Bryan v. Holy See, 556 F.3d 361, 376 (6th Cir. 2009), which in its review of the Petitioners' Complaint applied the rule that "'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" (Quoting Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005)). Viewed under this standard, both the Sixth Circuit and the Kentucky district court found that the allegations in the Complaint were not conclusory and were sufficient to establish jurisdiction over the Holy See's employees and officials. For a summary of the allegations regarding the Holy See's control over its employees and officials in the United States, see Petition for Writ of Certiorari, pp. 2-8. Plaintiffs' Complaint specifically identifies the source of the Holy See's authority over its employees and officials as well as the execution of that authority in the United States. The Holy See's "facial" attack on

these allegations is squarely before the Court. No new attack premised upon Iqbal is warranted.

The challenge the Holy See intends to make in the future regarding its statute of limitations defense weighs in favor, not against, a review by this Court at the present stage. The application of the Kentucky statute of limitations to those answerable for failing to report priest sex abuse is a fact-intensive inquiry. Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. App. 1998), is the controlling case in Kentucky. In Secter, the plaintiff was assaulted seventeen years before the complaint was filed against the Diocese. The plaintiff did not learn until within a year of filing the complaint that the Diocese had been receiving reports of abuse and yet had taken no action to discipline or sanction the abuser, to inform other students, parents, or employees, or to report the incidents to state authorities. Secter, 966 S.W.2d at 290. Instead, the "information was kept secret and confidential in the Canon 489 file."[1] Id. The Kentucky court concluded that the Diocese's conduct implicated KRS 413.190(2), a Kentucky statute pursuant to which the limitations period may be tolled where the defendant conceals himself or obstructs the prosecution of the action. Id. The court also ruled that "where the law imposes a duty of disclosure, a failure of disclosure may constitute concealment under KRS 413.190(2), or at least amount to misleading or obstructive conduct." Id. (Quoting Munday v. Mayfair

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[1] Canon 489 of the Code of Canon Law requires a separate archive for the safeguarding of confidential information. Secter, 966 S.W.2d at 287-288. In Secter, secret Canon 489 files contained prior reports of sexual abuse and the bishop's recorded concerns about the abuser's pedophilia.

Diagnostic Lab., 831 S.W.2d 912, 915 (Ky. 1992)). Thus, it is clear that there will be a great deal of discovery regarding what was known to the Holy See and its employees and officials regarding sexual assaults by its clergy and what the Holy See and its employees and officials did with that information. The scope of the discovery that will be permitted will be dependent upon the lower court's jurisdiction. It is important to answer the jurisdictional question first, prior to discovery commencing in the case. Indeed, this was the very purpose of the Holy See's interlocutory appeal.

II. The Factual Support for Plaintiffs' Allegations that the Holy See Has a Longstanding Official Policy of Concealing Priest Sexual Abuse Have Been Strengthened in the Interim Period Pending Appeal

Since this appeal was taken, the systemic world-wide problem of concealing pedophiles and permitting children to be victimized by sexual predators in Catholic institutions was exposed in a well-publicized report by the Irish government, available online at http://www.childabusecommission.ie/rpt/pdfs/. In 2000, Ireland established "The Commission to Inquire into Child Abuse" to investigate child abuse in Irish institutions. The report, published May 20, 2009, focused on schools operated by the Catholic Church, and found beyond a doubt that church officials consistently shielded their orders' pedophiles from arrest amid a culture of secrecy. Conclusion No. 20 of the Executive Summary of the Report states:

Cases of sexual abuse were managed with a view to minimising the risk of public disclosure and consequent damage to the institution and the Congregation. This policy resulted in the protection of the perpetrator. When lay people were discovered to have sexually abused, they were generally reported to the Gardai. When a member of a Congregation was found to be abusing, it was dealt with internally and was not reported to the Gardai.

The damage to the children affected and the danger to others were disregarded. The difference in treatment of lay and religious abusers points to an awareness on the part of Congregational authorities of the seriousness of the offence, yet there was a reluctance to confront religious who offended in this way. The desire to protect the reputation of the Congregation and institution was paramount. Congregations asserted that knowledge of sexual abuse was not available in society at the time and that it was seen as a moral failing on the part of the Brother or priest. This assertion, however, ignores the fact that sexual abuse of children was a criminal offence.

Executive Summary, pages 21-22 (full text available at http://www.childabusecommission.com/rpt/pdfs/CICA-Executive%20Summary.pdf). The Commission's Report covered the time period from 1936 to the present, with most complaints between 1936 and 1970. Id., page 2.

The findings of the Irish government are consistent with the allegations in Plaintiffs' Complaint, that the 1962 document is "a reflection and written manifestation of the *longstanding* policies and directives of the Holy See regarding clergy sexual abuse.... The policies of the Holy See expressed *in this and other documents* require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal and civil authorities, even where such failure to report would itself be a criminal offense." Pet. App. E, p. 90a; J.A. 13 (emphasis added).

The Holy See in its opposition focuses upon the 1962 document and seeks to undermine its significance. Brief in Opposition, p. 28. The key significance of the 1962 document to Plaintiffs' allegations is the fact of its publication in July, 2003, that resulted in the public revelation of the Holy See's direct involvement in the handling of accusations of child sexual abuse by Roman Catholic priests, including the longstanding mandate of secrecy. Prior to the release of the 1962 document into the public domain in July, 2003, the Holy See's hand in prohibiting the disclosure of clergy-child sex abuse was not known. Its disclosure constituted the very first notice to anyone outside the church hierarchy that the Holy See was directly responsible for enforcing a code of silence regarding clergy child sex abuse. However, the Plaintiffs' allegation that the Holy See enforced a policy of silence does not rest or fall on the interpretation of the 1962 document. That document, also referred to as *Crimen sollicitationis* ("*Crimen*"), is merely a written embodiment of a policy that predates it by over a century.

Attached at App. 1 to this Reply is the full text of the Declaration of Thomas P. Doyle, O.P., K.C.D., C.A.D.C., dated October 9, 2008, which was submitted to the district court in support of Plaintiffs' request to take discovery of Pope Benedict XVI, the former Cardinal Ratzinger, who is now 82 years old, and who, as Cardinal, was head of the Holy See's Congregation for the Doctrine of Faith ("CDF"), which handles issues of clergy sexual abuse. The Holy See in its Brief in Opposition attacks Fr. Doyle as having made contradictory statements regarding the impact of the 1962 document. As Fr. Doyle makes clear, the 1962 document is one expression of the "Church's world-wide policy of secrecy that has been in place since at least 1866." Doyle Declaration, ¶ 5. The Holy See's policy of enforced silence did not begin with *Crimen sollicitationis*. *Crimen* was preceded by an essentially identical document issued on June 9, 1922, by the Supreme Sacred Congregation of the Holy Office (predecessor to the CDF). Id. ¶¶ 6-8. Like the 1962 document, the 1922 document was issued in strict secrecy and its content was never published in the official publication of the Holy See, the *Acta Apostolicae Sedis*. Id. However, both documents were sent to diocesan bishops. Id. ¶ 7.

The Holy See argues that *Crimen* is inconsequential based upon Fr. Doyle's opinion, previously expressed in other cases, that *Crimen* was not the result of a "conspiracy" or "cover up." In fact, the provocation for and nature of *Crimen* and its predecessor documents are much more important in the context of this case than evidence of a "conspiracy". They reflect the overarching Holy See policy of enforced secrecy in cases of child sex abuse. As stated by Fr. Doyle:

> [T]he 1962 document and its predecessor from 1922 are not proof of an explicit world-wide conspiracy to cover up clergy sex crimes. This is because it is more accurate to assess both documents as indications of *an official policy of secrecy* rather than a *conspiracy of cover up*. The policy of extreme confidentiality is deeply rooted in the ecclesial culture. The 1922 and 1962 documents did not create this culture. They arose out of it and gave legal force to the pattern of secrecy. Nor are they the only expression of the policy of secrecy. The secrecy surrounding child sexual abuse within the Catholic Church was a result of the policies of the Catholic Church, both written and unwritten, that have existed for centuries.

Id., ¶ 8 (emphasis in original).

The Holy See's "institutionalized concern for secrecy" goes hand in hand with the traditional canonical concept known as the "privilege of the forum" or "*privilegium fori*" which is a traditional privilege claimed by the institutional church whereby clerics (which includes deacons, priests and bishops, archbishops and cardinals) accused of crimes were tried before ecclesiastical courts and not brought before civil or secular courts. Id. ¶ 9. The fact that the procedural norms for intra-church secret prosecution of abusive priests were rarely utilized simply confirms Plaintiffs' claims. It does not contradict them. As alleged in Plaintiffs' Complaint, abusive priests were moved from church to church, district to district, and never prosecuted. Pet. App. E, pp. 105a-106a, 126a, ¶¶ 42, 99; J.A. 25-26, 43.

The fact that ecclesiastic prosecutions of abusive priests rarely occurred has been acknowledged by the church itself. For example, on August 29, 2003, the Diocese of Covington, Kentucky, publicly admitted to a vast record of child abuse by its priests and scant prosecution. In "A Report On The History of Sexual Abuse Of Minors In The Diocese of Covington," the Bishop of Covington issued "50 Year Report" outlining the extensive history of abuse of minors by Covington's priests.[2] As reported by the Bishop, "Over the past 50 years, there is reasonable cause to believe that 30 out of 372 diocesan priests [nearly 10%] have sexually abused one or more minors." "In the 1950's and 1960's sexual misconduct was perceived as a spiritual matter, a sin for confession with a penance to be performed with sincere contrition and a firm purpose of amendment. There was always the goal of forgiveness and redemption. The priest was sent for treatment at a residential facility or required to attend psychological counseling. Oftentimes, the recommendation from the mental health professionals was that the problem had been satisfactorily addressed and that the priest could safely be returned to ministry with appropriate monitoring and psychological and spiritual support." The fact that the canonical procedures were not followed is indicative of the severity of the problem created by the Holy See's mandated policy of silence. Not only were priests not being reported for civil prosecution, they were not being prosecuted within the church.

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[2] The full text of the Report is available online at http://www.covingtondiocese.org/index.cfm/NewsItemID=86685&From=Home.

The Holy See in its brief seems to suggest that it is entitled to conduct ecclesiastical "grand jury" proceedings in secret to protect the reputations of its clergy accused of child sexual abuse. Brief in Opposition, p. 11, fn. 5. However, Kentucky law does not, nor should it, permit the canonical "grand jury" process were allegations of child sexual abuse are kept secret. Certainly, the history of pervasive abuse within the Catholic Church has taught the fallacy of this approach.

III. Plaintiffs Did Not Waive Their Commercial Activity Arguments

Plaintiffs' Complaint and arguments below sufficiently framed the commercial activities of the Holy See both inside and outside of the United States and did not waive application of all three prongs of the commercial activity exception. The district court understood that Plaintiffs were asserting all three prongs. O'Bryan v. Holy See, 471 F.Supp.2d 784, 788 (W.D. Ky. 2007), J.A. 85 ("the plaintiff in the Doe case sought liability against the Holy See under only the first and third clauses of the commercial activity exception; *Plaintiff here seeks liability via all three clauses*" (emphasis added)). See also Plaintiffs' Response to Motion to Dismiss, p. 23, J.A. 237 (Arguing that the Holy See's commercial activities included directing "'its bishops *in the United States* to conceal from its parishioners and the general public the sexual abuse of children.'" (Quoting Complaint, ¶ 47, J.A. 27-28 (emphasis added)). The Sixth Circuit likewise found Plaintiffs had not waived their argument that all three prongs of the commercial activity exception applied to the conduct at issue.

IV. This Court Should Consider the Constitutional Implications of the Application of the FSIA to the Holy See

The Sixth Circuit did find Plaintiffs had waived their constitutional arguments by not raising them before the district court. O'Bryan v. Holy See, 556 F.3d 361, 375 (6th Cir. 2009). Plaintiffs encouraged the Sixth Circuit to consider the constitutional implications of the application of the FSIA to the Holy See's conduct in this case, and similarly encourage this Court not to disregard the important constitutional implications at issue here. There has been extensive briefing by all sides in this case and any determinations on the merits have been limited to the legal sufficiency of the allegations in the Plaintiffs' Complaint. Where no issue on the merits remains to be resolved and the issues involve issues of law, it is appropriate for the Court to address the constitutional challenges on appeal even if not raised below. Turner v. City of Memphis, Tenn., 369 U.S. 350, 353 (1962). Indeed, it is axiomatic that this Court should not take unconstitutional actions.

V. The Holy See's "Corporate Form" Arguments Are A Red Herring

The Holy See engages in an irrelevant analysis of corporate principles to distinguish itself from the Louisville Archdiocese, which is mentioned in passing in the Plaintiffs Complaint. Pet. App. E, pp. 113a-114a, ¶ 66; J.A. 32-33. This is not a case in which Plaintiffs have sued a "separate juridical entity" as an instrumentality of a foreign sovereign under 28 U.S.C. § 1603(a). See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, (1983). In

such case, a plaintiff demonstrates that the instrumentality is the agent or alter ego of the foreign state by alleging the means and methods by which the state exercises day-to-day control over the agency. Id. at 176-179. The Holy See's argument that Plaintiffs' allegations must be "analyzed in terms of the actions of the Louisville Corporation" was rejected by the Sixth Circuit, which noted that Plaintiffs repeatedly pled that the acts of which they complain were "committed by priests, clerics, bishops, archbishops, cardinals, agents and employees." O'Bryan, 556 F.3d at 383, fn. 9.

The remainder of the opposition's arguments do not appear to raise new issues and therefore Plaintiffs will address these arguments in their brief on the merits, if so permitted.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Petitioners pray that the Court grant a writ of certiorari in this matter.

Respectfully Submitted,

William F. McMurry
Counsel of Record
William F. McMurry,
Attorney-at-law
5932 Timber Ridge Drive
Suite 101
Prospect, KY 40059
(502) 228-7000

Douglas H. Morris
Lea A. Player
Morris & Player PLLC
5924 Timber Ridge Drive
Suite 202
P.O. Box 1329
Prospect, KY 40059
(502) 228-0664

Counsel for Petitioners

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:04CV-338-H

[Filed October 10, 2008]

ELECTRONICALLY FILED

JAMES H. O'BRYAN, DONALD E. POPPE and MICHAEL J. TURNER, Individually and on Behalf of All Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church

PLAINTIFFS

vs.

HOLY SEE, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization

DEFENDANT

DECLARATION OF THOMAS P. DOYLE, O.P., J.C.D., C.A.D.C.

1. I, Thomas Patrick Doyle, declare under penalty of perjury as provided for by the laws of the United States (28 U.S.C. §1746), that the following statements are true and correct:

2. The purpose of my original declaration (April 7, 2008) was to explain to the court that Cardinal Ratzinger, now Pope Benedict XVI, has extensive and unique factual knowledge regarding the extent of sexual abuse by Catholic clerics (which includes deacons, priests and bishops, archbishops and cardinals) in the U.S., and further that Pope Benedict has unique and extensive information on the extent of similar knowledge by former popes, especially Pope John Paul II.

3. Pope Benedict's knowledge, in both instances, is not based upon the existence of *Crimen sollicitationis*. Pope Benedict's knowledge, as clearly set forth in my original Declaration, is based upon his position as Prefect of the Congregation for the Doctrine of Faith, from 1981 to 2005, and his current position as Pope.

4. Rather, as set forth in my Declaration, **one of the matters** Pope Benedict would have extensive knowledge about is the 1962 Decree *Crimen sollicitationis*, a document expressing the Catholic Church's world-wide policy to maintain in absolute secrecy all canonical processes instituted as a result of reports of sexual abuse by priests and clerics.

5. As further set out herein, the *Crimen sollicitationis* is a document that:

a) Substantiates that the highest ranking officials of the Catholic Church have been aware for centuries of the wide spread problem of sexual abuse by its priests and clerics.

b) Is evidence of the Church's world-wide policy of secrecy that has been in place since at least 1866.

6. *Crimen sollicitationis* is essentially a set of procedural norms for processing cases of accusations against priests for soliciting sex while in the act of sacramental confession. Solicitation is an especially heinous canonical crime and one which results in severe penalties for those found guilty. This document on solicitation was preceded by one issued on June 9, 1922 by the Supreme Sacred Congregation of the Holy Office. It was signed by the prefect, Cardinal Merry del Val, and was approved by Pope Pius XI. Like the 1962 document, it was issued in strict secrecy and its content was never published in the official publication of the IIoly See, the *Acta Apostolicae Sedis*.

7. The 1922 and 1962 documents are identical in content. The 1962 document however contains an appendix which provides the formularies to be used for the various steps in the judicial process. Both documents were sent to diocesan bishops. The 1962 document was intended for use in cases involving diocesan priests as well as priests who were members of religious communities.

8. I have previously testified that the 1962 document and its predecessor from 1922 are not proof of an explicit world-wide conspiracy to cover up clergy

sex crimes. This is because it is more accurate to assess both documents as indications of *an official policy of secrecy* rather than a *conspiracy of cover up*. The policy of extreme confidentiality is deeply rooted in the ecclesial culture. The 1922 and 1962 documents did not create this culture. They arose out of it and gave legal force to the pattern of secrecy. Nor are they the only expression of the policy of secrecy. The secrecy surrounding child sexual abuse within the Catholic Church was a result of the policies of the Catholic Church, both written and unwritten, that have existed for centuries.

9. To fully understand the institutionalized concern for secrecy within the Catholic Church one must also understand the traditional canonical concept known as the "privilege of the forum" or "*privilegium fori*" which has its roots in early medieval Canon Law. Basically this is a traditional privilege claimed by the institutional church whereby clerics (which includes deacons, priests and bishops, archbishops and cardinals) accused of crimes were tried before ecclesiastical courts and not brought before civil or secular courts. The '*privilegium fori*" was included in the 1917 Code of Canon Law:

1. *Clerics in all cases, whether contentious or criminal, shall be brought before an ecclesiastical judge, unless it has been legitimately provided otherwise in certain places.*
2. *Cardinals, Legates of the Apostolic See, Bishops, even titular ones, Abbots, Prelates Nullius, Supreme Superiors of Religious Institutes of Pontifical Right, and major officials of the Roman Curia may not be*

> *summoned before lay judges for matters pertaining to their duties without referring first to the Holy See; the same is true for others enjoying the privilege of the forum, where the Ordinary of the place [diocesan bishop] where the matter is to be tried is to be approached. The Ordinary, however, especially when a lay person is the petitioner, will not deny this permission except for just and grave reasons, all the more so when he is unable to bring about a resolution of the controversy between the parties.* (Canon 119)

10. The canon that mentions the "privilege of the forum" was not repeated in the revised Code of 1983. However, the belief and practice among the institutional church that clerics not be subjected to the civil law, has been active at least since the 11th century. To put this matter in perspective, it is important to remember that the organization of the Catholic Church is modeled after a pre-medieval monarchy, which is hierarchical by design and monarchical in practice. The church is an absolute monarchy and the will of the monarch, the Pope, is to be followed by all its members.

11. Clergy sexual abuse issues are handled by the Congregation for the Doctrine of the Faith, a major department of the Vatican administration. This has been the case since the 16th century although the name of the present congregation has been changed twice during this period. It was first known as the Supreme Sacred Congregation of the Roman and Universal Inquisition (1542-1908). At the beginning of the 20th century, Pope Pius X changed the name to the Supreme Sacred Congregation of the Holy Office. After

Vatican Council II, the name was again changed to the Sacred Congregation for the Doctrine of the Faith (1965) and with the promulgation of the revised Code of Canon Law in 1983, the word "Sacred" was dropped. Cardinal Ratzinger, presently Pope Benedict XIV, had been the Prefect, or head, since 1981. Although he signed the letter containing the revised norms and quite possibly had a direct role in drafting it, the procedures themselves had to be approved or promulgated by the Pope for validity and effect. Cardinal Ratzinger became Pope Benedict XVI in 2005 and appointed William Cardinal Levada to succeed him as Prefect.

12. Under ordinary circumstances *Crimen Sollicitationis* would have ceased to have legal force with the promulgation of the 1983 Code of Canon Law. This was not the case however, and the words of the subsequent document, commonly known as *De delictis gravioribus*, signed by Cardinal Ratzinger, clarify this issue:

> *At approximately the same time the Congregation for the Faith, through an ad hoc Commission established, devoted itself to a diligent study of the canons on delicts, both of the Code of Canon Law and the Code of Canons of the Eastern Churches, in order to determine "more grave delicts both against morals and in the celebration of the sacraments" and in order to make special procedural norms "to declare or impose canonical sanctions," because* ***the Instruction Crimen sollicitationis, issued by the Supreme Sacred Congregation of the Holy Office on March 16, 1962, in force***

***until now**, was to be reviewed when the new canonical Codes were promulgated.*

13. Expressions of the belief and practice among the institutional church that clerics not be subjected to the civil law has been seen in recent civil cases of clergy sexual abuse. Several Vatican officials including Julian Cardinal Herranz, Tarcisio Cardinal Bertone and Fr. Gianfranco Ghirlando, S.J., have issued public statements to the effect that bishops should not be obliged to cooperate with secular legal authorities in cases involving sexual abuse by clerics. Cardinal Herranz, at the time President of the Pontifical Council for the Interpretation of Legislative texts, said:

While recognizing the competence of civil authorities, Herranz expressed strong reservations about the application to the Catholic church of two hallmarks of American civil law -- an obligation to report misconduct and monetary damages for institutional negligence.

"Given the emotional wave of public clamor," Herranz said, "some envision an obligation on the part of ecclesiastical authority to denounce to civil judges all the cases that come to their attention, as well an obligation to communicate to judges all the documentation from ecclesiastical archives."

Herranz rejected the idea.

"The rapport of trust and the secrecy of the office inherent to the relationship between the bishop and his priest collaborators, and between priests

and the faithful, must be respected," he said. (John Allen, May 17, 2002, National Catholic Reporter)

14. In a February 2002 interview with the Italian journal 30 Giorni, Cardinal Bertone, who was secretary of the Congregation for the Doctrine of the Faith at the time and later became papal secretary of State said:

"In my opinion, the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of pedophilia is unfounded," Bertone said. "Naturally civil society has the obligation to defend its citizens. But it must also respect the 'professional secrecy' of priests, as it respects the professional secrecy of other categories, a respect that cannot be reduced simply to the inviolable seal of the confessional. (John Allen, May 30, 2002, National Catholic Reporter)

15. Fr. Gianfranco Ghirlanda, S.J., is dean of the faculty of Canon Law at the Gregorian University in Rome. In an interview in 2002, he spoke about a number of aspects related to clergy sex abuse including the involvement of the secular courts:

Jesuit Fr. Gianfranco Ghirlanda, dean of the canon law faculty at Rome's Gregorian University and a judge for the Apostolic Signatura, considered the Vatican's supreme court, addressed the issue in the May 18 issue of La Civilta Cattolica. The journal is considered quasi-official since it is reviewed by the

Vatican's Secretariat of State prior to publication.

"Certainly it does not seem pastoral behavior when a bishop or religious superior who has received a complaint informs the legal authorities of the fact in order to avoid being implicated in a civil process that the victim could undertake," Ghirlanda wrote. (Ibid., John Allen)

16. Cardinal Ratzinger, now Pope Benedict XVI, as Prefect of the CDF from 1981-2005 was in the position at the Vatican that was most involved in enforcing these policies, and is the most knowledgeable person in the world regarding how these policies were interpreted and enforced.

17. There are nine major departments within the Vatican bureaucracy, called Congregations. In addition there is the Secretariate of State, the tribunals, Pontifical Commissions, Pontifical Councils and offices. All major decisions emanating from the Congregations are personally approved by the Pope, who generally meets with the Prefect (head) on a regular, and sometimes, weekly basis. Therefore, Cardinal Ratzinger, now Pope XVI, would also be in the best position to know what was known by Pope John Paul II.

18. *Crimen Sollicitationis* remained in effect until 2001 when the Vatican published a new set of procedures for investigating and prosecuting especially grave canonical crimes, including certain sexual crimes committed by the clergy. Two official documents were issued. The first was an apostolic

letter of Pope John Paul II, known by its Latin title *Sacramentorum sanctitatis tutela*, by which the actual norms were promulgated. This letter, dated April 30, 2001, was followed on May 18, 2001 by an official document that contained the actual norms. This latter document was signed by Cardinal Josef Ratzinger, prefect of the Congregation for the Doctrine of the Faith. Both documents refer to certain serious canonical crimes and among those is sexual abuse by clerics. These documents represent revised procedures to be used by Bishops and major religious superiors in response to allegations of clergy sexual abuse.

19. Though some have claimed that *Crimen Sollicitationis* applies only to solicitation in the confessional, and not to other sexual crimes perpetrated by clerics, the opposite is true. The very words of the document itself clearly establish that those acts included under the classification of "the worst crime" (*de crimine pessimo*) are to be processed according to the norms set forth for the crime of solicitation. Title V of the document, "*De crimine pessimo*," includes the crimes of sexual contact with same sex partners, sexual contacts with minors and bestiality. These crimes are also to be processed according to these special norms. The document does not imply that these crimes were to have been perpetrated through solicitation in the confessional. It included them under the title "The worst crimes" and presumably because of their serious nature, they were included under these special procedural norms. The 1922 document has an identical section. The norms of both documents were thus established as the obligatory procedures for prosecuting cases of four separate and distinct canonical crimes, namely, a) solicitation for sex in the act of sacramental

confession, b) homosexual sex, c) sexual abuse of minor males or females, d) bestiality or sex with animals. It is therefore incorrect to state that the norms and procedures of *Crimen Sollicitationis* are applicable only to cases of solicitation for sex in the confessional.

20. These four types of sexual crimes were already included in the Code of Canon Law (1917 version). Solicitation is covered in canon 2368, par. 1 and sexual contact with minors and bestiality in canon 2359, 2. Ordinarily the prosecution of these crimes would be processed according to the procedural laws of the Code. The 1922 and 1962 documents provided special norms with an added emphasis on confidentiality because of the very serious nature of the crimes involved. These special procedural norms were an expansion, with added detail, upon the procedural law of the Code.

21. The applicability of *Crimen* to crimes other than solicitation in the confessional is an issue that was taken up by Msgr. Brian Ferme, J.C.D., in his article entitled "*Graviora delicta: the apostolic letter M.P. Sacramentorum sanctitatis tutela*" which appeared in the book Il processo penale canonico (Rome: Lateran University Press, 2003):

> *While the instruction dealt specifically with solicitation and the procedural norms to be applied in judging this crime, the fifth chapter stated that the same norms were also to be observed for the "crimen pessimum" (art. 71), which was understood to include paedolphilia (art. 73). In other words at the promulgation of the CIC83 [Code of Canon Law, 1983] the "graviora delicta" reserved to the CDF seemed to be those concerned with solicitation, the*

violation of the seal of confession and the "criminum pessimum" as understood by the 1962 Norms, though the actual praxis of the Congregation may have included others.

22. Regarding the application of *Crimen* in the Archdiocese of Louisville, although I have not personally seen any written evidence that the procedures outlined in the *Crimen* were used in a prosecution in the archdiocese of Louisville, such lack of known written evidence cannot lead to the conclusion that the archbishop was not obliged to follow its norms, nor that these norms were never communicated to the archdiocese. *Crimen sollicitationis* is known as an "Instruction," and was sent to every bishop in the world; yet detailed awareness of its contents has been limited to bishops, and other church officials with a need to know. Unlike most official legal documents issued by the Holy See, this document as well as its 1922 predecessor were not included in any of the collections, official or private. Although some unofficial sources have claimed that the 1962 document was only sent to bishops upon request, there is no reason to believe such an assertion. The fact that a copy of the document may not be found in diocesan archives or a bishop's personal files does not constitute proof that it was not sent to all bishops.

23. The existence of *Crimen sollicitationis* has been authenticated by several sources including sworn testimony of one bishop and one cardinal as well as two professors of Canon Law.

24. Although *Crimen sollicitationis* was published with orders that it remain confidential, this did not

prohibit it from being studied after its promulgation. Francis Cardinal George, Archbishop of Chicago, testified in 2008 that the document was known to him as a seminarian and that it was studied as part of a course on moral theology:

> *Q. Did you know that the Office of the Holy See through the Congregation of the Doctrine of the Faith had implemented a protocol and an instruction to all the superiors across the world regarding solicitation in the confessional?*
>
> *A. What was the year of that protocol please?*
>
> *Q. The year the protocol was issued was '62.*
>
> *A. Oh. Okay. Then yes.*
>
> *Q. My question goes to 2002 and did you know that such a protocol had been issued and disseminated by the Office of the Holy See to the superiors?*
>
> *A. Yes. I was a seminarian in 1962 and in moral theology class that was the document that was given us when we discussed the sacrament of penance.* (Deposition in Doe et al vs. Archdiocese of Chicago, Jan. 30, 2008, p. 24-25)

25. Bishop Joseph Madera, retired bishop of Fresno, also testified in a deposition (Coordinated proceeding, Clergy Cases III, March 1, 2006) that when he was a pastor in Los Angeles in 1962, the archbishop called a special meeting of the priests to discuss the document:

Q. Have you ever seen any protocols issued by the Vatican at any time while serving as a priest or as a bishop that deals with crimes of solicitation in the confessional and protocols dealing with it?

A. I was familiar that we had to take action. I was informed.

Q. By the Vatican?

A. Yes.

Q. How were you so informed?

A. I was in Oxnard...And the Bishop of Los Angeles used to call us to meetings and explain to us what kind of important issues had been published.

Q. Did you understand that when it came to crimes of solicitation in the confessional, if such an accusation was to be made or was made, it was to be kept secret under those protocols?

A. No. I had a very clear idea what I was supposed to do in those cases.

Q. What were you supposed to do?

A. Report it to Rome immediately. (P. 156, 157)

Q. Bishop Madera, you had mentioned that in connection with our discussion about the protocols from the Vatican and the solicitation in the confessional, that there was some kind of meeting with the archbishop where these protocols were discussed. When was that?

A. With the Archbishop of Los Angeles?

Q. Yes

A. Probably in the early sixties. Probably.

Q. Was that then Archbishop Manning?

A. Yes. (P. 159. 160)

26. Pope Benedict XVI is the supreme executive, judge and legislator of the Catholic Church and the Holy See. According to Canon Law the pope is not subject to ecclesiastical law (cf. canon 1404). He can change the law or waive the law for himself. Therefore, the Pope is not bound by the limitations of *Regolamento Generale della Curia Romana* (Mar. 20, 1968), *Regolamento Generale della Curia Romana* (Apr. 30, 1999) and *Instructio Secreta continere*, Feb. 4, 1974. The Pope is actually not a member of the Roman or Vatican Curia. Rather, the Curia and all of its departments exist to assist the Pope in his various duties of pastoral and administrative governance.

27. Regarding my qualification as an expert, I am familiar with the bureaucracy of the Catholic Church by reason of my training as a priest. However, I developed in-depth knowledge of the Vatican and its organization, including the details of the history, organization, and responsibility of the CDF, by reason of my training as a canon lawyer. Further, I was assigned to the Vatican Embassy in the U.S. as the Staff Canon Lawyer from 1981 through 1986. In that role, I worked on a regular basis with the Papal Nuncio–The Vatican's ambassador to the U.S. During that time, I became even more intimately familiar with

the responsibilities of the various "Congregations" or departments of the Vatican including the CDF. I first became directly involved with sexual abuse of children by Catholic clerics when, in 1984 I was asked to monitor the development of a case of sexual abuse by a priest sent to the Vatican Embassy by the Bishop of Lafayette Louisiana. Beginning with that case and since, I have done extensive research and writing on the historical and contemporary response of the institutional Catholic Church to the sexual abuse of children. My original declaration and this supplemental declaration are based on the knowledge and information I obtained in all of those roles.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on Oct. 9, 2008, 2008.

/s/ Thomas P. Doyle
Thomas P. Doyle, J.C.D., C.A.D.C.